

MEMORANDUM

Date: March 27, 2003

TO: Mary Ann Wright, Associate Director

From: Steve Alder, Assistant Attorney General

Re: Ontario Mine

**Conclusion.**

The statute of limitations precludes bringing an action at this time against either Noranda or United Park City Mines (UPCM). It has been more than 20 years after the termination of mining operations and more than 10 years after UPCM refused to allow an inspection. There is little legal authority to support a claim that the failure to reclaim constitutes a continuing violation.

The definition of "operator" would have included UPCM as an owner during the period of operation and perhaps shortly thereafter, but UPCM's current activities do not fall within the definitions that would require compliance with the Act. Although UPCM's activities are directed toward protecting the site for possible future mining operations, these activities (pumping water and other maintenance) do not by themselves constitute 'mining operations' or 'proposed mining operations'. For the activities to be in furtherance of a "proposed mining operation" there needs to be a more concrete and likely mining activity.

If the mine has water drainage flows or periodic discharges of toxic substances, then these intermittent acts might constitute a basis for finding a continuing violation based on earlier mining operations. However, if that is the case, enforcement of DOGM's reclamation requirements is not certain. In addition, past actions by DEQ and EPA regarding such discharges should be investigated.

**Introduction.**

You have asked that I review the regulatory options available to the Division to address potential reclamation at the Ontario Mine Site. The chronology that has been provided to me from the file shows that the mining; i.e. removal of ore from the ground ceased in 1982 when the then un-permitted operator terminated its operations. It appears that there had been an application by the operator, Noranda, to get a permit, that reclamation plans had been submitted and reviewed, but that no proposed plan was approved and no bond was posted prior to termination.

The owner of the land including the minerals and the mine improvements has been and continues to be United Park City Mines. There is substantial evidence that UPCM has been holding the mine and expending, by its own claims, about \$1 million per year to maintain the property. There was (within 1 year) a proposal to use the mine as an amusement ride and museum, to partially offset the costs of *maintaining the mine*. This proposal has been withdrawn but shows that they are continuing to maintain the mine to preserve the option of mining.

In 1992 the Division took a serious look at the options available to it to regulate the facility and apparently decided not to proceed with an inspection that would have led to regulation and reclamation. The position of UPCM has been that they were never an operator and so are not subject to the requirements of the Act.

### **Issues Presented.**

Are Noranda and United Park City Mines responsible for the current reclamation needed at the mine. The potential problems with proceeding include: (1) overcoming the applicable statutes of limitation; or (2) determining if there are current activities that are within the jurisdiction of the Act.

### **Analysis.**

#### **1. Noranda's liability.**

Although no permit was issued, it is probably without dispute that Noranda continued mining for more than two years after the deadline (under the 1977 mine reclamation law) to get a permit, and in 1982 was liable for reclamation under the Act. The failure to complete a permit, or post a bond would not excuse the requirement to reclaim to the minimum standards. The statute had a two year statute of limitations and allowed a two year period for an inactive status to continue before an evaluation was to be initiated by the division to evaluate "the status of the mining operation" and the "performance under the reclamation plan". Such an evaluation required that the operator provide information, and if not provided might have extended the period further during which time the parties might have exchanged requests. However, even under these possible scenarios the latest date that the Division would have been within the two year statute of limitations, for bringing a action for a violation of the act would have expired in 1992. It was in the summer of 1992 that the Division made a thorough review of the options, and elected not to proceed against UPCM.

To apply the Act to Noranda's past activities then or today would require a finding that the failure to reclaim or the continued presence of the un-reclaimed site constitutes a continuing violation. The violation of the Act such as failure to post a bond, or failure to get a permit would have been precluded, but arguably the continued open mine site could constitute an on-going violation.

Continuing liability is a theory that developed in tort law to apply to trespasses and nuisances that continue. Although the trespass may have begun long ago, they are considered to still be actionable under the law because of the continuing nature of the trespass. This theory of law distinguishes between continuing or temporary acts and permanent types of trespass. Those that are permanent are deemed to require an action within the date of the original action (or after reasonable notice of it), while those that are temporary do not. This is a distinction that seems arbitrary at times, (e.g. a house may be temporary), but it is well established in the law generally and in Utah law. The waste rock deposited at the mine site, is more likely to be seen as permanent rather than temporary. In addition, the legal support for liability for a continuing violations of a regulation (as opposed to a tort against a neighbor) is not common in mining regulation and there is no case law supporting such a theory in Utah. Absent such legal support, requiring reclamation based on the theory of continued violation or trespass is a very long shot.

## 2. United Park City Mine's Liability.

### Operator Status.

The defense to regulation asserted by UPCM in 1992 and prior was that they were never an "operator". They admit to being a mine owner, and to owning and maintaining the mine for future purposes which presumably is mining. The question raised is do these activities bring them under the Act's requirements to prepare a plan and to post a bond for reclamation, and if not, to reclaim.

The definition of an "operator" includes a person, corporation, or any entity that "owning, controlling, or managing a mining operation or *proposed mining operation*. . . ." This definition seems to include UPCM during the time of mining and shortly thereafter. UPCM admits to owning the property, buildings, and mining related improvements. These clearly did constitute a mining operation, and after closure may have been considered a "proposed mining operation". The definition of "mining operations" does not include water extraction for non-mining purposes, but would include mining extraction for a mining operation. Exploration and development, which are defined, do not include managing or maintaining a mine. At the time that Noranda was operating, UPCM was an owner and arguably could have been brought in as an "operator" within the terms of the definition, especially since Noranda was never officially an operator under an approved plan.

### Statute of limitations.

However, the fact that UPCM was possibly an operator during the 80's still leaves the same statute of limitations problems as exist against Noranda. These cannot be overcome any more easily against UPCM than against Noranda. In fact, the formal confrontation in 1992 probably put the Division on notice that it had an obligation to 'put up or shut up.' The additional 10 years makes the statute of limitations

argument of UPCM even stronger, even though the statute of limitations has been increased to 5 years. It also provides UPCM with the defense that the division is estopped as a result of its not promptly taking action at a time when an action by UPCM against Noranda might have been possible.

#### Current Activities.

Today the statutory definition is less effective than it was. It is essentially the same except it now excludes activities that "will not cause significant surface resource disturbance or involve the use of mechanized earth moving equipment". Maintenance of the mine seems to fall into that category of exclusion from regulation. As such, the current activities are less likely to be mining operations and so not subject to current regulation.

It is possible that a court might agree that UPCM is an owner, hence operator, if it could be shown that there are proposed mining activities anticipated for the Ontario Mine. However, after over 20 years of inactivity, there is little evidence that would support a claim of a proposed mine. The definition of "proposed mining operation" would reasonably require a likelihood of actual and imminent mining activity.

The argument that there is a continuing violation of the reclamation obligation also does not offer much encouragement against UPCM. The facts of this case are not so egregious as to make that argument very successfully. The amount of reclamation required to meet the communities' concerns and the dangers imposed by not doing it are not known, but appear not to be extreme. If it is shown that there are periodic escapes of toxic materials or flow of contaminated water or air from the site, then the possibility of the continuing liability theory might be researched further depending on what actions the EPA and state DEQ may have taken.